No. 49884-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

ARTHUR WEST,
appellant,

Vs.

THE CITY OF TACOMA,
respondent

Review of a decision entered by
the Honorable Judge Cuthbertson

APPELLANT'S AMENDED RESPONSE BRIEF

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pm 3/13/10

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1. The City of Tacoma deliberately concealed and silently withheld records responsive to secrion 1 of West's Public Records Request for "Threat Assessments" without indicating that other responsive records were known to be in existence.

A fundemental tenent of the Public Records Act is that public agencies must act reasonably and in good faith to answer records requests and provide responsive records. To this end RCW 42.56.100 requires that agencies to adopt and follow regulations that ensure "the fullest assistance to inquirers".

Contrary to this standard, the city's entire argument in this case is based upon an unreasonable and deliberate misrepresentation by the city (see respondent's brief, page 6) of West's records request to exclude section 1 of the request, which, in clear and unambiguous language, specifically sought:

> **1.** Records of threat assessments submitted to the City and or the Tacoma Fire Department in relation to the permitting process for the proposed LNG terminal on property leased from the Port of Tacoma.

This secion of the request was not, as the City wrongfully attempts to assert, a solely a request for "Modelling Records" (See Respondent's Brief, Page 8, or solely for "Internal threat and safety assessments" (See Respondent's Brief, Page 6).

Despite the City's artful use of repetative, antiquated and

historically discredited propaganda techniques[1] to attempt to misstate the truth, the fact remains – in spite of the city's strident and repetative denials – that the siting report (to which the PHAST modelling was appended as appendix K) and the Fire Protection Evaluation were records responsive to section 1 of West's request, and the City deliberately failed to produce them in a self-serving and calculated manner.

By any reasonable person's definition, the Siting report (that the PHAST Modelling was appended to as Appendix K), and the Fire Protection Evaluation were undeniably , *"threat assessments submitted to the City and or the Tacoma Fire Department in relation to the permitting process for the proposed LNG terminal"* and the City of Tacoma violated the public Records Act by silently and deliberately withholding these responsive records.

This case should be remanded back to the Superior Court.

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[1] The repeated articulation of a complex of events that justify subsequent action. The descriptions of these events have elements of truth, and the "big lie" generalizations merge and eventually supplant the public's accurate perception of the underlying events. "If you tell a lie big enough and keep repeating it, people will eventually come to believe it. The lie can be maintained only for such time as the State can shield the people from the political, economic and/or military consequences of the lie. It thus becomes vitally important for the State to use all of its powers to repress dissent, for the truth is the mortal enemy of the lie, and thus by extension, the truth is the greatest enemy of the State." *Joseph Goebbels, The Poison Dwarf*, Holocaust Education and Archive Research Team http://www.holocaustresearchproject.org/holoprelude/goebbels.html

2. The City of Tacoma deliberately edited, concealed, and silently withheld records responsive to section 1 of West's Public Records Request for "Threat Assessments" without indicating that other responsive records were known to be in existence or requesting clarification.....

The second mammoth misstatement that the City attempts to base its arguments upon is their non-existent request for clarification – a request that in reality was never actually made.

In this case, their simply was no request for clarification, or any colorable basis for such a request to begin with . The city, by its own admission, *improperly edited* the entirety of the responsive Siting Report and Fire Protection Evaluation and implicitly concealed the editing by merely informed West that it had interpreted his request to "include" the PHAST modelling record.

Absolutely no hint was given as to the city's editing of the entire responsive record, the interpretation of the request to ***exclude*** other responsive records, or even of the existence of the greater whole to which the PHAST modelling was merely an Appendix, and certainly no suggestion was made that the PHAST modelling was an integral part (Appendix K) of a larger record the city was withholding, or that there was a Fire Protection Evaluation that met the definition of a "threat assessment".

Had the City reasonably assisted West by disclosed this information, as it was reasonably required to do, or had it actually asked for clarification as to whether West's request was for the entire Siting Report and Fire Protection Evaluation, rather than just for one of many appendices to the Report, West would have known of the existence of these responsive records and informed the City he wanted those records too. Yet without such information from the city, West was unaware that these other responsive records existed that the city obviously believed West had an obligation to "ferret out" by means of superhuman clairvoyant skills and uber-diligent research.

Thus, the city's argument can be seen to be fatally flawed in that it is not only based upon a request for clarification that never existed, but it is further contrary to the principles set forth by the Attorney General in the Model Rules that an agency may not, by evasive tactics, silently exclude records from its response and require a requestor to "ferret out" what responsive records might exist by some combination of intuition and diligent research:

> A requestor is not required to "ferret out" records on his or her own. WAC 44-14-04003 (9), Citing to *Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an

> applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").

Significantly, the City has failed to identify a single statute or any relevant case law that allows an agency to edit responsive records or conceal the existence of portions of responsive records.

Nor is there any authority to support the City's assertions that a requestor is required to inform an agency *after it has closed out a PRA request* of missing documents the agency has itself concealed the existence of, because there is no such authority.

Contrary to the City's fanciful claims, there is simply no requirement that a citizen requesting records must advise the agency of missing documents thatbthe citizen is unaware of, and which the agency has itself silently withheld, especially after a request has been terminated.

To establish such a standard the Court would have to embrace the worst type of silent withholding and add an additional requirement of administrative necromancy to the combination of diligent research, clairvoyance and exhaustive "Ferreting out" requirements already expressly rejected by the Court in *Daines*.

The clarification procedure in statute does not provide any basis for

the actions of the City in this case, because the request was not "unclear" to begin with and, more significantly, because *the City of Tacoma never actually asked for clarification*, even after it closed the request.

In any event, under the facts of this case the clarification process was simply not employed by the city and the clarification defense is not available to justify silent withholding of responsive records in response to a clear request ***after*** the city closed a request, all whike it was silently withholding the fact that it had edited and silently withheld the entirety of the siting report and fire evaluation study with the exception of Appendix K, the single PHAST Modelling (portion of a responsive) record that it did produce.

As the Model Rules explain..

> ... An agency may seek a clarification of an "unclear" request. RCW 42.17.320/42.56.520. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records.
> If the requestor fails to clarify an unclear request, the agency need not respond to it further. RCW 42.17.320/42.56.520. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor. WAC 44-14-04003 (7)

The city edited and silently withheld responsive records while producing only an edited portion, appendix K, and failed to comply with the Model Rules or the required statutory procedure for requesting clarification ***before*** closing the request.

Apparently, not only does the city maintain that West was required to use "magic words" of unspecified content in his request to identify the records he sought, it also seeks to assert that he was required to perform a mind reading act to rival that of "Carnac the Magnificent"[2] to divine, by some occult means, the existence of records that the city was actively concealing, and then, by further trancendental means, travel back through time to provide clarification prior to the city's closure of his PRA request.

Needless to say, as appellant West's occult divining powers were not of the magintude to rival those of the Great Carnac, these expectations on the part of the city were not realistic expectations, and this case should be remanded for the Trial Court to find a violation of the PRA and for any appropriate further proceedings.

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[2] See, e.g. https://en.wikipedia.org/wiki/Carnac_the_Magnificent, *Seriously Funny* The Rebel Comedians of the 1950s and 1960s. Nachman, Gerald, (2003). New York, NY: Pantheon Books. p.169 "I hold in my hand the envelopes. As a child of four can plainly see, these envelopes have been hermetically sealed. They've been kept in a mayonnaise jar on Funk and Wagnalls' porch since noon today. ***No one*** knows the contents of these envelopes – but you, in your mystical and borderline divine way, will ascertain the answers having never before heard the questions."

3. The city's specious claim of a (mis)understanding that "West sought (only) the identical records to those (sic) requested by Carlton") (see CP 65 line 1-2) to exclude all records other than the PHAST Modeling, was without any rational or colorable basis and was patently unreasonable.

The City advances yet another supremely specious and patently unreasonable argument when it outrageously attempts to justify silent withholding and the editing of a responsive record by its specious claim of unilateral employment of extra-statutory individual distinctions to edit the express terms of West's PRA Request.

As the City's Brief extensively argues, the City relied upon a specious extra-statutory individual distincton to attempt to justify the profoundly unjustifiable reality, that they deliberatel misread West's request to exclude the portions of the Siting Report and Fire Evaluation Study the city edited out of its response, a response which consisted solely of the PHAST Modelling record, which was itself, merely Appendix K to the complete whole record that should have been disclosed in its entirety, without deliberate and disingenuous editing.

Even setting aside for a moment the city's undeniable deliberate and disingenuous editing of the record actually responsive

to West's request, and its editing and silent withholding of the entirety of the responsive record other than Appendix K, the manifest and clearly expressed intent of the Public Records Act clearly establishes that agencies must rely s*olely on statutory exemptions* for withholding records *and cannot rely upon individual distinctions* such as those claimed by the City of Tacoma as the basis for withholding known responsive records in this case...

> The intent of this legislation is to make clear that: (1) Absent statutory provisions to the contrary, ***agencies possessing records should*** in responding to requests for disclosure ***not make any distinctions in releasing or not releasing records*** based upon the identity of the person or agency which requested the records, and (2) ***agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records***. Laws of 1987, ch. 403, § 1, at 1546; (emphasis added)

The City violated the PRA by deliberate and disingenuous editing of the record actually responsive to West's request, its silent withholding of the entirety of the responsive record other than Appendix K, and/or in failing to conduct a reasonable search, by deliberately, and in bad faith, making invidious distinctions and relying upon an extra-statutory basis for editing and withholding known responsive records.

It is beyond any reasonble dispute that the city deliberately and disingenuously editied Appendix K (the PHAST Modelling) out of the Siting Report and Fire Protection Evaluation, (the entirety of the record actually responsive to West's request) and that the City purposefully edited and restricted the scope of its response in order to conceal the portions of these responsive records not covered under the Carlton injunction. (the PHAST Modelling)

It is also beyond any reasonble dispute that the city cannot subsequently employ *an injunction entered over Four Months later against a third party* (Derrik Nunnally of the Tacoma News Tribune) as a smokescreen or ex post facto justification to justify the concealment and withholding of records it should have identified and produced in response to plaintiff West's request – a request which, it must be remembered, was made and (improperly) answered over Four (4) months prior to the entry of the Nunnally Injunction!

The city's deliberate editing of a responsive record and its facially unveracious claims of a "misundrstanding" unsupported in fact or law are clearly, palpably, and patently unreasonable. This case should be remaded for further proceedings.

4. The city's silently withholding of records from West on May 3, 2016 was and could in no way be justified by an injunction issued against other parties on August 26, 2016, nearly 4 months later.....

The Trial Court further erred in finding that the city's silent withholding of responsive records from West was ***retroactively justified*** by an injunction entered, ex post facto, against third parties nearly 4 months **after** the city withheld the records from West.

This conclusion violated the principle that:

> Subsequent events do not affect the wrongfulness of the agency's initial action to withhold the records if the records were wrongfully withheld at that time. Spokane Research & Defense Fund v. City of Spokane,. 155 Wn.2d 89, 117 P.3d 1117 (2005)

The entry of an injunction in an action where West was not joined *4 months after the City silently withheld responsive records* can in no way act retroactively to justify silent withholding, as such a finding would be contrary not only to common sense but to widely accepted scientific notions of quantum mechanics and the more commonly observed "phenomenological unidirectional nature of time"[3]

[3] See, *Large scale physical effects of T violation in mesons*, J. A. Vaccaro Centre for Quantum Dynamics, Griffith University, 170 Kessels Road, Brisbane 4111, Australia, https://www.scribd.com/document/28425503/Unidirectional-nature-of-time "This work resolves the long-standing problem of modeling the dynamics of T violation processes. It shows that T violation has previously unknown, large-scale physical effects and that these effects underlie the origin of the unidirectionality of time. It also provides a view of the quantum nature of time itself...We can compare this with our own experience of the

The city and the Trial Court's failure to recognize the fundamental reality stemming from legal precedent, quantum mechanics, and the phenomenologicaly observed reality of the unidirectional nature time in our space-time continuum violated clearly established rules of both physics and law, and justifies an order of remand from this Court.

5. The city violated the Public Records Act by failing to respond as required by RCW 42.56.550 in regard to responsive public records of "threat assessments" it knew to be in existence.....

Once all of the "elephantine fiction" arguments employed by the city have been examined, and rejected as facially flawed, there is simpy no credible dispute that the Fire Protection Study and the Siting Report (that the admittedly responsive PHAST Modeling was an integral part of) were responsive to section 1 of West's Public Records Request, and that the city violated the PRA by silently withholding these records.

This silent withholding was the most serious variety of violation the Public Records Act for, as the Court explained in PAWS...

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time evolution of the universe...Our experience, therefore, is consistent...(with the experimental results)..., and this underpins the observed phenomenological unidirectional nature of time...

> Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. *See PAWS v. UW,* 125 Wn.2d 243 at 270, (1994), citing *Fisons*, 122 Wn.2d at 350-55.

Just as the Supreme Court noted in PAWS, the silent withholding of the threat and safety assessments by the City of Tacoma in this case created the misleading impression that all documents relevant to plaintiff West's request had been disclosed.

The city cannot fairly be permitted to evade the provisions of clearly established law by improperly editing a responsive siting report, committing a textbook example of silent withholding of records, and falsely representing the silent withholding to be a request for clarification, especially when it is apparent that the city deliberately edited and withheld responsive records of threat assessments concerning a controversial project, records that it wanted to suppress for political reasons.

CONCLUSION

The city was well aware that West's records request fairly included within its ambit the Siting Report and Fire Protection Evaluation Study. Yet the city deliberately edited and silently withheld these records. At no time did the city ask for clarification or even hint that responsive records other than the PHAST Modeling records might exist.

Unlike the Great Carnac, West is not a "mystic from the East" who can psychically "divine" unknown answers to unseen questions, and therefor lacked the occult and trancendental divinatory ability that would have been necessary to suspect that the city was silently and deliberately withholding responsive records other than the PHAST Modelling it produced.

Despite the city's unprecedented exercise in the theoretic quantum mechanics of ex post facto injunctive relief, the plain circumstance remains that as of May 3, 2016, when the city withheld records from West, the injunction of August 26, 2016 that it attempts to rely upon for that withholding was simply not in existence.

This Court reverse should the ruling of the Trial Court and remand this matter back to the Superior Court.

Respectfully submitted this 13th day of March, 2018.

s/Arthur West
ARTHUR WEST

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2018, I caused to be served the preceding document via Email: on Martha Lantz, Attorney for Respondent City of Tacoma, at **mlantz@ci.tacoma.wa.us.**

s/Arthur West
ARTHUR WEST